78-1631

No. [redacted]

In the
Supreme Court of the United States
October Term, 1978

LEONARD BERLIN,

Petitioner,

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF LEONARD BERLIN FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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OPINIONS BELOW

The statement of the opinions and orders of the Appellate Court of Illinois, First District, and the Supreme Court of Illinois are accurately stated. (Pet., p. 4).

JURISDICTIONAL STATEMENT

Respondents contest the jurisdictional statement of petitioner in view of their contention that no question under the Constitution of the United States arose in and as a result of the decision of the Appellate Court of Illinois. Implicit in the decision of the Supreme Court of Illinois

in denying petitioner's petition for an appeal as a matter of right under Rule 317 of the Rules of the Supreme Court of Illinois (ch. 110A, sec. 317, Ill. Rev. Stat.) is that no such constitutional question arose.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution in pertinent part provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ch. 110, sec. 41, Ill. Rev. Stat. (1977), provides:

> Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal.
>
> The State of Illinois or any agency thereof shall be subject to the provisions of this Section in the same manner as any other party.
>
> Where the litigation involves review of a determination of an admistrative agency, the court shall include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.

> Amended by P.A. 79-1434, § 8, eff. Sept. 19, 1976; P.A. 80-1097, § 2, eff. Nov. 23, 1977.

QUESTION PRESENTED FOR REVIEW

Whether the doctor—petitioner can claim a violation of rights under the Fourteenth Amendment where the State court refuses to recognize his claim to a new remedy against his patient, his patient's husband and his patient's attorneys for bringing an allegedly groundless malpractice suit against him.

STATEMENT OF THE CASE

This is a cause of action brought by petitioner, Dr. Leonard Berlin (hereafter at times "petitioner" or "Dr. Berlin") against respondents, Harriet Nathan (a former patient of Dr. Berlin who caused a medical malpractice suit to be brought against him, and who will be referred to at times as "Harriet"), Gilbert Nathan (an attorney and Harriet's husband, referred herein at times as "Gilbert"), and Fred Benjamin and Stuart Shapiro (attorneys in the firm of Benjamin and Shapiro who represented Harriet in the underlying medical malpractice lawsuit against Dr. Berlin, who will be referred to at times as "Benjamin" or "Shapiro" or collectively as "the attorneys"). This case was tried before a jury which rendered a verdict in the amount $2,000.00 compensatory damages and $6,000.00 punitive damages against all defendants. Following the denial of timely post-trial motions, the defendants appealed to the Appellate Court of Illinois, First District.

By unanimous decision, the Appellate Court reversed the judgment entered by the trial court and remanded the cause for the entry of an order dismissing the petitioner's complaint. (Pet. App. 1a-26a).

Petitioner sought to have the Appellate Court's decision reviewed in the Supreme Court of Illinois, bail but that Court denied his petition (Pet. App. 27a), and denied a motion for reconsideration of its decision. (Pet. App. 28a).

SUMMARY OF THE ARGUMENT

It is the contention of respondents that the Appellate Court of Illinois properly refused to recognize a common law or constitutional right of action by a physician against his former patient and her husband and her attorneys for negligence or wilful and wanton misconduct in the filing of a medical malpractice suit against him. Petitioner refused to seek existing remedies (e.g., a suit for malicious presecution or a recovery under section 41 of the Civil Practice Act, ch. 110, sec. 41, Ill. Rev. Stat.), opting instead to carve out totally new remedies which, in the last analysis, would virtually dry up access to the courts.

The question presented by petitioner here has been raised on many occasions in various state courts, and as observed by the Appellate Court in its decision: "The plaintiff (petitioner here) has cited no case where an appellate court has upheld a complaint brought by a treating physician against his former patient or if deceased, the patient's family or the patient's attorneys for the bringing of a tort action against the physician where malicious prosecution has not been shown and this court has found none." (Pet. App. 19a, n. 2). See also Annot. 84 A.L.R. 3d 555.

Petitioner's attempt to raise his alleged grievance to a constitutional plane is absurd.

ARGUMENT

I.

THERE IS NO CONSTITUTIONAL QUESTION WHATEVER, LET ALONE A QUESTION OF SUBSTANCE, RAISED IN THIS PETITION.

Paradoxically, petitioner twists logic on its head and contends that the decision of the Appellate Court has "deprived [him] of any meaningful access to the Illinois courts." He reasons from "statistics" that in malicious prosecution suits state appellate courts have "consistently . . . reversed trial courts which sought to provide effective relief to victims of maliciously or frivolously filed lawsuits." He states that appellate courts have "failed to superintend the correction of the proble . . ." and this warrants "the intervention of this Honorable Court to provide a superintending and correcting influence." (Pet., pp. 10-11). This, he says, violates his rights to due process and equal protection under the Fourteenth Amendment.

Respondents do not disagree with the proposition that under certain circumstances a cause of action may exist for the wrongful bringing of civil proceedings. Such an action is related and arose as an adjunct to the action for malicious criminal prosecution. An action for the wrongful bringing of civil proceedings is recognized, however, only when the civil suit is alleged to have been brought without probable cause and with a malicious motive. Prosser, *Law of Torts,* §870, pp. 870-76 (3rd Ed. 1964).

In Illinois, there is neither common law nor statutory authority to sustain the causes of action alleged by the

plaintiff. In *Hill Co.* v. *Contractors Supply Co.,* 249 Ill. 304, 94 N.E. 544 (1911), the Court stated:

> "At common law a person is not liable for bringing any suit, criminal or civil or for causing a seizure of property, if the court had jurisdiction of the subject matter and the parties, unless he acts maliciously and without probable cause." 249 Ill., at 310, 94 N.E. at 546.

One of the cases cited by *Hill* in support of this proposition is *Stewart* v. *Sonneborn,* 98 U.S. 187 (1878), where an action was brought by the plaintiff for an alleged wrongful institution of bankruptcy proceedings against him. In *Stewart,* this Court stated:

> "It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action and not merely to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present time require substantially the same elements. Certainly, an action instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding." 98 U.S., at 192. *In accord* 52 Am. Jur. 2d, Malicious Prosecution, §6, p. 190.

This is not a situation where a remedy is unavailable to petitioner for redress of his alleged wrong. Where *no* remedy has existed for a wrong, the courts in Illinois have at times fashioned a remedy. *Skelly Oil Company* v. *Universal Oil Products Company,* 338 Ill. App. 79, 86 N.E.2d 875 (1st Dist. 1949); *Eick* v. *Perk Dog Food Company,* 347 Ill. App. 293, 106 N.E.2d 742 (1st Dist. 1952); *Johnson* v. *Luhman,* 330 Ill. App. 598, 71 N.E.2d 810 (2d Dist. 1947). The remedy presently available to petitioner *in this case* takes the form of Section 41 of the Civil Practice Act which provides:

> "Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleasing them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fees to be summarily taxed by the court upon motion within thirty days of the judgment or dismissal." S.H.A., ch. 110, §41 (Supp. 1977).

This section was revised in 1977 to eliminate the words "and not in good faith." With this revision Section 41 has been strengthened to allow more liberal use by the courts.

The extended, thoughtful decision of the Appellate Court of Illinois provides compelling reasons to support its decision, including the truism: "The importance of free access to the courts demands that this access be maintained even though occasionally some innocent person must suffer." (Pet. App. 20a). As outlined in the Appellate Court's decision, every court of review which has addressed this issue, whether in Illinois or in any other State, has uniformly rejected plaintiff's contention. (Pet. App., pp. 19a-20a, and the cases cited therein). Nor has petitioner cited any such authority in his Petition.

The injuries alleged by the plaintiff are damage to reputation, mental anguish, loss of time for defending the malpractice action, and the speculation of increased insurance premiums. These alleged "injuries" are nothing more than the result of being named as a defendant

in a lawsuit. These "injuries", at best, are injuries to reputation arising from the filing of the lawsuit. The allegation regarding increased insurance premiums is entirely speculative in nature as there is no proof or allegation in the plaintiff's complaint of any such present damage or injury. In any event this "injury" is similar to all other defendants named in any lawsuit.

The Appellate Court in its decision repudiated the contention that public policy demands a recognition of this new cause of action. Its conclusion, consistent with *all* other recent decisions on this precise issue, was that expending time, money and suffering anxiety in the defense of the unwarranted and unfounded lawsuit "unfortunately is a price which must necessarily be paid to keep the courts open to the people." (Pet. App., pp. 19a-20a).

Petitioner and the Amicus can recite general principles of constitutional law until they are breathless, and the result is the same. Unless this Court is prepared to usurp the prerogative of State courts to determine common law or statutory rights and remedies in personal injury actions and in the supervision of alleged abuses of the use of judicial process or courts, this petition should be denied.

Finally, respondents will not extend this brief with a contest of the many unsupportable and totally inaccurate statements made in the documents filed in this Court by petitioner and the Amicus, not the least of which is the claimed proliferation of frivolous suits against physicians and hospitals in the delivery of health care. Nor will comment be made upon the egregious trial errors more than 50 alleged to have occurred in the trial of this cause.

We would make the following comment in passing, however:

1. The increase in malpractice claims is due predominately to a recognition by patients of their rights in this area and to a small number of courageous physicians who have agreed to testify in these cases. The mistakes are less often buried these days.

2. The aspect of malpractice claims has led to better medicine by *more* physicians. Defensive medicine means careful medicine. More physicians are doing more reading of medical literature and less in the *Wall Street Journal.*

3. The premium escalation means that premiums are simply rising to a level at which they should have been years ago.

4. The failure to win a major percentage of malpractice claims is more due to the difficulty in establishing a case (the increased burden on plaintiffs) and the undeniable enormous lobbying effort made by physicians and hospitals to "brain wash" prospective jurors against these claims. In each visit or with each bill, a patient receives a diatribe against malpractice claims and the lawyers who bring them, with a statement that the increase in the bill is the result of "frivolous" claims.

CONCLUSION

For the reasons given, respondents respectfully pray that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Attorney for Respondents